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# Liberty, Patriarchy, and Feminism

*Richard A. Epstein<sup>†</sup>*

Relationships between the sexes — a topic that now passes under the rubric of gender studies — engage each of us all the time. The terms of these interactions are direct, personal, and largely inescapable. For everyone, the issues of perspective and bias necessarily surge to the fore, because everyone necessarily receives direct information about these relationships from only one side of the great divide. What a man learns about women does not come from his direct experience as a woman. What a woman learns about men (and here the point seems forgotten sometimes) likewise does not stem from her direct experience as a man. Neither side occupies any privileged position. All of us, men and women, can learn from observation and conversation, some better than others. But that knowledge is always mediated by a barrier that no amount of socialization can overcome.

Our constant interaction with other people of both sexes invites and compels us to hold powerful opinions on how these relationships should be structured, both in our own lives and in the larger world. This immediacy of our perceptions exerts a powerful influence over how the subject of relationships is both perceived and taught. Few of us, for example, have had the misfortune to be involved in tort litigation, so we do not bring to the study of tort theory deep personal convictions on the roles of negligence, contributory negligence, and proximate causation. But our nonstop experience on matters pertaining to relations between the sexes makes it harder to maintain that same level of intellectual detachment. The constant stream of new information must in its own way contribute to the gulf in perceptions that separates (some) men from (some) women.

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## I. WHY PATRIARCHY?

The depth of that separation was brought home to me with great force by the Article of my former student and colleague, Professor Mary Becker. In the course of her Article, Becker describes the ubiquitous nature of patriarchy, noting that it survives in one form or another in virtually any form of social organization. "Patriarchal social structures have been tribal, monarchical, and totalitarian; dictatorial and democratic; nomadic, feudal, capitalist, and socialist; religious and atheistic; primitive and post-modern; tolerant and repressive of pornography."<sup>1</sup> To Becker the vast differences between these social systems count for naught in the larger scheme of things. In dealing with this material, three components of her remarks require some comment.

First, Becker insists dogmatically that all men and all women are alike, thus overlooking differences within as well as between the sexes. Second, Becker problematically relies on non-falsifiable propositions about the role of sex differences in human behavior. Third, Becker pessimistically evaluates human nature, both male and female. Let us take up these points in order.

## A. Categorical Sex Classifications

Becker's first major methodological flaw is her failure to examine the differences, crude or subtle, within either the class of men or the class of women. In both her oral presentation and Article for this Volume, I do not recall hearing the word "some" used to modify either men or women. Her propositions were couched in categorical terms about how all men interact with all women. The possibility that some natural dispersion of behaviors and attitudes could, or indeed must, surface in any large population did not slow down her condemnation of what she perceives as the sorry subordinate status of women in relationship to men.

Nor is she alone. To give but one other well-known example, Robin West invoked similar declamatory utterances in describing the differences between men and women. In seeking to define the differences between men and women in terms of their social relationships, she wrote: "Women are actually or potentially materially connected to other human life. Men aren't. This material fact has existential consequences. While it may be true *for men* that

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<sup>1</sup> Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U Chi Legal F 21, 26.

the individual is 'epistemologically and morally prior to the collectivity,' it is not true for women.<sup>72</sup>

Taken in its narrower compass, the position seems to state the logical oddity that women are connected to men, but men are not connected to women. It seems to posit that women invariably bond among themselves, when it is impossible for men to form and maintain the simplest social attachments. From this it follows that autonomy and freedom are male values, embodied in the traditional rule-of-law belief that all persons stand as free, equal, and independent human beings with equal dignity before the law.<sup>3</sup> To someone like West or Becker, this preoccupation with autonomy leads to the rigid separation between individuals, which is wholly inconsistent with the nurturing and caring ways that women interact with each other. The result is a kind of legal and social inferno in which women routinely and silently are forced to live in a topsy-turvy world "of intimacy, bonding, separation, sexual invasion, nurturance and intrusion."<sup>4</sup> According to this reasoning, it goes without saying that the good things are generated among women themselves and the bad things, both social and sexual, are imposed on them by men.

This assertion misunderstands the logic of autonomy and freedom by relegating them to the lowly status of male virtues. Liberty has no gender. Nothing about the general principle of liberty tells men or women what kinds of relationships they should enter. If men prefer arm's length deals with rigid contractual terms that remove all opportunities for good faith defenses, let them. If women prefer to enter into relationship contracts under which they share risk and shun courts, let them. If contracts between men and women fall somewhere between these two extremes, that's fine as well. If some men migrate to the ostensible female pattern, that's fine too; and so is the reverse migration by women. The principle of autonomy carries with it the *right* to dis-

<sup>2</sup> Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1, 14 (1988).

<sup>3</sup> One species is Ronald Dworkin, *A Matter of Principle* 191 (Harvard 1985), quoted in West, 55 U Chi L Rev at 6 (cited in note 2). Thus Dworkin writes: "What does it mean for the government to treat its citizens as equals? *That is . . . the same question as the question of what it means for the government to treat all its citizens as free, or as independent, or with equal dignity.*" Id (emphasis added) (capitalization omitted). His answer, a howling nonsequitur, is the principle of "rough equality: resources and opportunities should be distributed, so far as possible, equally, so that roughly the same share of whatever is available is devoted to satisfying the ambitions of each." Dworkin, *A Matter of Principle* at 192. The sentence is written in the passive voice, so we do not quite know who does the distribution. And it leaves open the question of how many times we must redistribute when wealth is both increased and skewed through market transactions.

<sup>4</sup> West, 55 U Chi L Rev at 65 (cited in note 2).

pose of one's labor and capital as one sees fit. It does not dictate the types of arrangements that any person can or should enter, given the power. The classical system of freedom of contract is flexible enough to accommodate the tastes of all individuals under one umbrella, and more importantly, by allowing them the right to choose their contracting partners it promotes an efficient sorting of individuals so that like team up with like.<sup>5</sup> Indeed, in contemporary society the power of assortive mating, under which men and women marry by social class, exerts an enormous influence on the overall social landscape.<sup>6</sup> The acts of dominance and coercion, when brought about by the threat and use of force, form no part of a system of autonomy and freedom. They constitute the cardinal vices within the system.

Becker's categorical approach, on either sociability or dominance, does more than misunderstand the logic of freedom and autonomy. It is intrinsically odd for *a priori* reasons. The matter has less to do with distinctive features of feminist thought than with the law of large numbers. Whatever the mechanism in any particular case, the brute fact of variation within members of any given class is the one immutable feature of any large population. All men are not the same age, the same height, or the same weight; nor do they have the same temperaments and personalities. The same proposition is indubitably true about women as well. The persistent refusal to recognize how differences play out within the sexes may serve a useful rhetorical function of highlighting differences between these two distributions. But it also has the dangerous consequence of ignoring important differences among men, and differences among women, which, once obscured, will surely lead us to draw extreme and indefensible conclusions.

Here is but one example. If all men were "the same," then it would hardly pay for any woman to be selective about the choice of mates: why incur search costs if all roads lead to the same marital oblivion? But if differences in temperament, style, and intellect matter, then the extensive sampling and courtship that goes on in the marriage market (here literally construed) starts to make sense. If the costs of search are roughly constant, then the returns to search will be highest in markets where the searching

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<sup>5</sup> See generally Richard A. Epstein, *Simple Rules for A Complex World* 71-90 (Harvard 1995).

<sup>6</sup> Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* 110-13 (Free Press 1994). The high parallels of like marrying like that Herrnstein and Murray report cut sharply against the dominance model of the radical feminists.

party faces the highest variance. On this model it is easy to understand from both the individual and social perspective the time and emotional effort that men and women put into finding the right mate.

#### B. Feminist Ether, or The Nonfalsifiability of Patriarchy

The second point about Becker's position, again like so much of feminist theory, is that its major conclusions are nonfalsifiable by any known technique of scientific research. The villain of the piece is patriarchy, for whose sins this patriarch is charged with full responsibility. But the modern use of the term patriarchy in feminist discourse bears only a passing resemblance to its narrower use in traditional discourse. My Funk & Wagnalls dictionary defines a patriarch as "[t]he leader of a family or tribe who rules by paternal right."<sup>7</sup> Patriarchy, then, is defined to cover "[a] system of government in which the father or the male heir of his choice rules." Even with these definitions under our belt, we are well advised not to overlook the parallel definitions for women. Thus a matriarch is defined as "[a] woman holding the position corresponding to that of a patriarch in her family or tribe."<sup>8</sup> Matriarchy for its part is defined as "[a] social organization having the mother as the head of the family, in which descent, kinship, and succession are reckoned through the mother, instead of the father; also government by women."<sup>9</sup> It is noteworthy that it does not speak of "rule by maternal right," so that some social asymmetry is acknowledged in the parallel definitions.

Standing alone, of course, these definitions give us no indication of the relative practical importance of matriarchy and patriarchy. But even with patriarchy as the dominant norm, it remains critical to note the implicit limitations in its classical definition. First, the term is applied much more to family and to tribes than it is to nation states, which have leaders, most of whom have been male. The point matters because it shows the dangers of treating the state as an extension of the family by other means. Patriarchs may obtain their power through inheritance, or even by designation of the past leader. But once we move outside the realm of kings, political power comes through elections, which give the public control over the selection of can-

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<sup>7</sup> *Funk & Wagnalls New International Dictionary of The English Language* 924 (comprehensive ed 1987).

<sup>8</sup> *Id.* at 786.

<sup>9</sup> *Id.*

didates, whose actions, once they assume office, are subject to powerful institutional restraints. To call the President of the United States a patriarch is to confuse him with the older patriarchs, Abraham, Isaac, and Jacob (for whom the matriarchs were Sarah, Rebecca, Rachel, and Leah).

Second, the creation of any patriarchal order does not confer that lofty status on all men. Only those men with the power to rule over others receive that title. Patriarchy therefore contemplates that younger males will occupy a subordinate position within the system. The system also limits the patriarch's freedom of action to prevent him from becoming a despot. Finding out exactly how a patriarchy operates and how one patriarchy differs from another is no simple task. But no matter how great the variations, so long as patriarchal structures are hierarchical, only a tiny fraction of males can occupy the highest positions. The rest must be content to rest, perhaps for life, on lower rungs.

In her Article, as in much of feminist literature, Becker does not use the term patriarch in this literal, dictionary sense of the word. She did not apply it only to family power that passes by inheritance. Nor did she limit it to the power that some men exercise in their governance roles. Rather, in her hands, patriarchy is used, as best I can tell, as a crude synonym for pervasive and unjust male domination of all areas of social life. At this point, her overexaggeration about the pervasive nature of patriarchy reminds me of the nineteenth century arguments about the ineffable status of ether.<sup>10</sup>

Patriarchy, I suppose, differs in some important ways from ether. But it is odd to hear complaints about its all-pervasive nature when it is so difficult to observe. Of course, some men behave abusively toward some women. Of course, male strength makes a difference in some interactions between men and women. But it is hardly the case that male dominance has ever generated a static system in which men take the prime cuts of meat, leaving women with only the scraps. Indeed, it seems foolhardy to stress the point because the shift in male and female roles within my own lifetime has been so profound that it seems almost idle to imagine some unyielding form of social organization attributable to this one invisible and invincible source. One obvious measure of the

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<sup>10</sup> As that century wore on, it became ever more clear that Newtonian physics required some fixed point of reference for its various postulates to work, supplied by an all-pervasive ether. Yet that ether was not observed anywhere. In the end, the entire structure collapsed and the modern theory of relativity took its place. For a brief account, see Gerald Holton, *Einstein, History, and Other Passions* 177-78 (Woodbury 1995).

change is visual. Let anyone who cares take a walk down the corridors of the old Billings Hospital at the University of Chicago and look at the photographs documenting the composition by sex and race of its graduates from 1954 to the present. The shift from a nearly all white male class to the current mixture of male and female of all races is eyepoppingly clear. The patriarchal forces that generate this enormous transformation operate in ways that are too subtle for this observer to understand. It takes a story of mythic proportions to find in these permanent social changes a strategic retreat by some old guard which will, cunningly in the dark of night, reassert its dominance.

Nor need we rely only on this form of pictorial evidence to make the case. A quick look at the *Statistical Abstract of the United States* reveals the profound changes that have taken place.<sup>11</sup> The total number of higher education degrees (those beyond high school) has moved up by 365 percent, from 477,000 in 1960 to 2,218,000 in 1995. But what is quite striking is the shift in the proportions of male and female graduates. In bachelor's degrees, male degrees have moved up by 107 percent, from 254,000 to 526,000. Yet at the same time, female degrees have moved up by 359 percent, from 138,000 to about 634,000. Thus in 1960 about 65 percent of the bachelor's degrees were awarded to men. By 1995, only 45 percent of the degrees were awarded to men. The shift in professional and doctoral programs has been every bit as pronounced. As late as 1965, fewer than 5 percent of all professional degrees were awarded to women, who also received just under 12 percent of the doctoral degrees. By 1995, women received about 41 percent of professional degrees and nearly 40 percent of the doctoral degrees.<sup>12</sup>

The distribution of degrees across subject matter is not constant, but even here the movement has been palpable. From 1971 to 1995, the percentage of women who earned Ph.D.s in the biological and life sciences moved from 16.3 to 40.1 percent; in mathematics, the move was from 7.6 to 22.1 percent.<sup>13</sup> Indeed, the percentage of female Ph.D.s dropped in only one field over that 24-year period, parks and recreation. But that number should not be taken too seriously since only two Ph.D.s were awarded in that

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<sup>11</sup> United States Bureau of the Census, *Statistical Abstract of the United States: 1998* 199, Table No 323 (GPO 118th ed 1998) ("Earned Degrees Conferred, by Level and Sex: 1960 to 1995").

<sup>12</sup> Id.

<sup>13</sup> Id at 201, Table No 326 ("Master's and Doctorate's Degrees Earned, by Field: 1971 to 1995").



field in 1971, one to a man and one to a woman.<sup>14</sup> The movement is a stunning refutation of the invisible hand of patriarchy. Perhaps one could comb these statistics for some hidden evidence of the continued oppression of women, but any fair-minded observer should first acknowledge the enormous changes already made before expressing any reservations about the differences that remain.<sup>15</sup>

### C. Patriarchy's Pessimism

This brings me then to my third source of disagreement. I recoil from the terrible portrait of all men and all women conveyed in Becker's morbid descriptions of patriarchy. It is hard to know what image to deplore more. Should we be depressed at the thought of legions of men beating their wives and daughters into a pulp for the basest of sensual gratification? Or should we recoil from the thought of millions of women who lack the gumption to stand up to the men who have wrecked their lives through abuse and sexual domination? It is a portrait of human kind that is so unrelentingly negative that one wonders why anyone would bother to bring children into the world. No one can deny that some horror stories of this sort do exist. Some men, and some women, have done terrible deeds in their lives: they have killed, they have lied, they have committed treachery. Lawyers are, of course, familiar with these cases because bad news attracts a crowd, whether we speak of a large financial fraud or of a Presidential scandal that ends in impeachment. Yet here again we have to have some balance. For every case of personal betrayal, we can find ten, or a hundred, acts of generosity and good will, from men to women and from women to men. Some marriages end in acrimonious divorces, but in others husbands and wives stay together in love through thick and thin until "death do us part."

To evaluate the overall social position we have to be careful about how we gather and sample our data. It is, in a word, necessary for us to counter Becker's gloom by a succession of happy thoughts about the high points of human life. As a professor for over 30 years, I could act as though all of my students had been jailed or disbarred. I prefer to think of the many students who

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<sup>14</sup> Id.

<sup>15</sup> See, for example, Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv L Rev 1728, 1793 (1986) (noting that the residual earnings gap between men and women is much smaller than critics commonly acknowledge).

entered the University of Chicago (or earlier at the University of Southern California) ill-formed, young, uncertain, and ambitious. Now ten, fifteen, twenty-five years later, it is a pleasure to see them lead happy and productive lives, and to hope that their education had something to do with their personal and professional success. It is not that everyone has had carefree lives: many have had to juggle career and marriage; many have fallen off the rails more than once; many have had to adjust their expectations to the brutal realities of everyday life; many have suffered personal disappointments, deaths of loved-ones, and debilitating injuries. But even in defeat many have summoned the strength to carry on. Harsh talk about hierarchy and patriarchy demeans their personal achievements; it trivializes their personal setbacks and disappointments. The less said about it the better, and the more quickly we can get on with the ordinary business of life. Any legal theory that presupposes that narrow and pinched vision of human nature, or that substitutes accusations of patriarchy for a more nuanced look at complex social systems, must fail with the falseness of its morbid presuppositions about human behavior, both within and between the sexes.

## II. WHERE WE STAND

Once we have put patriarchy in its place, it is important to look more closely at our legal rules. No assessment of the issues that surround feminism can ignore the massive legal revolution that started in the second half of the 19th century and continued through the aftermath of the First World War. As with so many powerful social movements, this one was not confined to the United States. Rather, for a wide variety of political and social reasons, virtually every advanced nation accepted, though not without pain and turmoil, two basic propositions about the place of women in society. The first involves recognizing the full civil capacity for women: the right to contract, to hold property, to make wills, to give testimony, and the like. The second deals with legally protecting participation in the political process: the right to vote, to hold elective and appointive office, and the like.

All of these legal changes receive the powerful support of people with strong libertarian inclinations, like myself. The simple proposition underlying that theory is the Lockean ideal that all individuals are free, equal, and independent in a state of na-

ture.<sup>16</sup> Allowing only some individuals to participate in commerce or politics amounts to a crude restriction on entry that is no more defensible than similar restrictions on entry into specific lines of business and commerce.<sup>17</sup> To be sure, competition always brings with it pain for established competitors who may lose influence or wealth in the process. But a dynamic assessment of the situation yields a far different result, for new competitors create opportunities for the full range of suppliers and customers with whom they have to do business. As each of us in turn assumes various roles, we are benefited and harmed in turn by the advent of new persons into any marketplace. But over the long haul, the increased productivity that follows from the admission of women into commerce swamps all other effects before it.

The advent of women into politics and public life obviously creates a different dynamic because majority rule operates under very different principles than markets. But at the normative level, the final conclusion is equally inescapable. No political order can hope to maintain its legitimacy while excluding over one-half the population from its processes. These points are so incontrovertible that it is idle to dispute them today. It is quite impossible to think of any political theory that could repudiate these commitments. It is therefore inconceivable that any patriarch, however clever or devious, will be able to undo these profound changes in the social order, or claim that these are but cosmetic changes in form with little or anything to do with the operation of political power. Quite the contrary, the new rules of public life mark a profound political progression from which we should take heart.<sup>18</sup> Moving toward the libertarian ideal of full and equal capacity under law counts as our most enduring legal achievement.

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<sup>16</sup> John Locke, *Two Treatises of Government* 269–78 (Cambridge Student ed 1988) (Peter Laslett, ed).

<sup>17</sup> On which, see Friedrich A. Hayek, *The Road to Serfdom* 37 (Chicago 1944) (discussing the importance of competition in “bringing about an effective co-ordination of individual efforts”).

<sup>18</sup> In 1998, Arizona elected women to all of five of its top statewide offices. See B. Drummond Ayres, Jr., *Arizona Sets Record For a Year of Women*, NY Times A18 (Nov 10, 1998). Women are also increasingly represented in state legislatures, where they hold 22.3 percent of all state legislative seats in the United States, up from a mere 4 percent in 1969. See Sam Howe Verhovek, *Record for Women in Washington Legislature*, NY Times A18 (Feb 4, 1999). In five states, led by Washington with 40.8 percent, women hold greater than 32 percent of the legislative seats. *Id.*

### III. WHAT'S IN A NAME? FROM WOMEN'S LIBERATION TO FEMINISM

The standard libertarian position proved over time to be a mixed blessing to the women's movement. In the early days, the correspondence in objectives between the two systems was close enough so that it could be asked with some fairness, why should not every woman be a libertarian in her orientation?

To give but one example, the one nineteenth century decision that stirs the feminist wrath more than any other is *Bradwell v Illinois*,<sup>19</sup> where Justice Bradley's now infamous concurrence appealed to natural differences between the sexes to justify the restriction that Illinois sought to place on the right of women to practice law. The critical point here is that this decision is indefensible on libertarian grounds *even if* we gave full force to Bradley's descriptive arguments. If women are less fit for the practice of law, then we should expect to see them enter the profession in smaller numbers. The insights of Justice Bradley would then have predictive power, but they would not justify the imposition of any entry restrictions on those women who were prepared to

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<sup>19</sup> 83 US 130 (1873). In discharging its power to admit members to the Bar, the Justices of the Illinois Supreme Court wrote:

That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.

In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.

Id at 132–33 (quoting the Illinois Supreme Court opinion). Justice Miller's majority opinion affirmed the decision below by relying on the Court's decision in the *Slaughter-House Cases*, 83 US 36 (1873), which held that the privileges and immunities clause of the fourteenth amendment extended only to the rights of individuals as federal citizens and did not touch on the rights of individuals to enter into certain professions and occupations. Id at 139. Justice Bradley's concurrence took things a bit further. In one famous passage, he wrote:

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

83 US at 141 (Bradley concurring).

negotiate the pitfalls that lay before them. Indeed one oft-unappreciated strength of the “formal” libertarian position is that it does not make the right of any individual to enter any profession contingent on some unstated empirical assumption about the supposed fitness of any group member to meet the standards of that profession. Those judgments can be made on an individual basis within the marketplace once the formal barriers to entry have been limited.

Cases like *Bradwell* gave the early women’s movement a huge target at which to shoot. To be sure, civil and political capacity were not its only objectives, given its evident concern with protecting women against physical assault and various forms of economic insecurity.<sup>20</sup> These themes, however, quickly rose from their once-subordinate status once the initial set of legal reforms was achieved in the public and private sector. It is therefore no mere coincidence that the name of the women’s movement tended to shift with the re-orientation of its political objectives. For a while the term “women’s liberation” had a certain caché, and with it a certain deserved ambiguity. On the one hand it hearkened back to the older program of civil and political rights, and the need to liberate women from their second-class status so they could assume their role as autonomous individuals and political citizens. But the playful sense of the term carried with it a second meaning — women could also be liberated from the various social conventions that structured their lives and constrained their social and economic choices in ways more subtle than any law could impose. In the end, the coyness of the expression proved to be its own undoing, and the broader, more assertive term “feminism” has fairly swept the board as the umbrella term for the women’s movement.<sup>21</sup>

#### A. Freedom of Opportunity, Friction in Outcomes

In matters of sex, as well as matters of race, however, the shift from formal equality to social equality is far more complex than a simple change in words. Formal equality can be achieved by a simple change in legal rules. Once capacity is granted, it can then be exercised in whatever fashion its holders choose, so long

<sup>20</sup> See, for example, Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 171–83, 195–214 (Harvard 1989) (discussing rape and pornography); id at 64–80 (discussing wages for housework).

<sup>21</sup> See generally Nancy F. Cott, *The Grounding of Modern Feminism* 283 (Yale 1987) (arguing that “feminism” in the 1960s and 1970s became “a term of unity, to transcend the divisions between women’s liberation and women’s rights”).

as they can gain the cooperation of other individuals to join in their ventures. A woman may enter into the practice of law but she, no more than any man, cannot compel others to become her clients. The net effect of civil capacity, however, is to create a form of social diversity in individual behavior. The law of contracts allows persons to give up what they value least to obtain what they value most. In many cases it allows them to make bets with their futures, to give up one set of expectations and to receive another in exchange. Sometimes these gambles work out, so that success, fame, and wealth follow. In other cases, the gambles fail, and with that failure comes disappointment, mediocrity, and distress. In all cases, however, unleashing the mechanism of voluntary exchange creates a dispersion in the fame and fortune of the population that operates under its rules. That powerful impulse, however, is very difficult to reconcile with any regime that demands the equality of results among individuals or groups that are endowed at some starting point with an equality of formal rights. One of the central challenges to feminism, and indeed to any political theory, is to make sense of the observed differences in outcomes. What does it tell us about the initial conditions under which the various groups labor? What does it tell us about the process under which their various life choices have been made?

In one sense the disconnect between the equality of opportunity and the equality of results does not give rise to pause. Let us suppose that there is wide variation in the success and fortune of individual men and women, but that the distribution in outcomes within one sex looked about the same as it did for the other, whether measured by income, occupational choice, health, or life expectancy. At this point, most feminists would be happy to call it a day because of their willingness to acknowledge that the process is fair when it has generated fair results across men and women as groups. Life offers no individual any personal guarantees, but so long as expectations at the starting line are the same for both groups, an unlucky spin of the wheel of fortune counts as an individual but not a social concern.

The rising concern with identical group outcomes severs the comfortable link between equality and liberty that lies at the core of libertarian systems. Each person has the equal liberty to achieve what he or she can with his or her natural endowments. No one should prejudge the process and presume that some orderly pattern of justice (to use Robert Nozick's phrase) has to come out of the thousands of small decisions that self-interested

individuals make for themselves.<sup>22</sup> But in truth, the separation between inputs and outputs has never been that tidy even within a libertarian system. In its idealized version, all moves that individuals make are through voluntary transactions, using some prior set of entitlements to labor or physical resources. But the classical model of libertarianism allows victimized persons to set aside individual transactions tainted by fraud, incompetence, and duress. Yet once we make that simple observation — it is not a concession — we are literally forced to make a second adjustment: now it becomes possible that some forms of duress, fraud, and incompetence will be undetected in individual transactions, so that one has to look for some broader proxy that will permit one to get rid of these distorting transactions. That proxy may not depend on strict proof of misbehavior in the individual case.

From there it is but a short leap to make this conclusion. Changing the legal rules did not yield anything like identical distributions between men and women in critical areas. Even though there is great movement, it is easy to show that virtually all the CEOs of Fortune 500 companies are male;<sup>23</sup> that occupational skews by sex are quite powerful so that it is not improper to identify some occupations (the caring professions of nursing and counseling, for example) as female and other occupations (the construction trades, for example) as male.<sup>24</sup> Indeed even as we look at subgroups of certain well-sought-after professions, we find striking occupational skews in the midst of a more generic equality: well over 90 percent of neurosurgeons and orthopedic surgeons are male; yet nearly a majority of pediatricians are female.<sup>25</sup> These trends are too pronounced to have taken place by mere chance. The question for the day — for the libertarian at least — is whether they took place through voluntary sorting or impermissible influences.

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<sup>22</sup> See Robert Nozick, *Anarchy, State, and Utopia* 153–64 (Basic Books 1974).

<sup>23</sup> When Hewlett-Packard selected Carleton S. Fiorina as its CEO in July 1999, Fiorina became only the third woman CEO of a Fortune 500 company. See Steve Lohr, *Setting Her Own Precedents: Hewlett's Chief Prefers the Path Less Traveled*, NY Times C1 (July 23, 1999).

<sup>24</sup> Of registered nurses, women made up 97 percent of the profession in 1975 and 93 percent in 1995. Of elementary school teachers, women made up 85 percent of the profession in 1975 and 84 percent in 1995. By contrast, of carpenters, women made up 1 percent of the occupation in 1975 and 1995. Of automobile mechanics, women made up 0 percent of the occupation in 1975 and 1 percent in 1995. Barbara H. Wootton, *Gender Differences in Occupational Employment*, Monthly Labor Review 15, 17 (Apr 1997).

<sup>25</sup> In 1997, men comprised 96 percent of neurosurgeons and 97 percent of orthopedic surgeons, while women comprised 46 percent of pediatricians. See American Medical Association, *Physician Characteristics and Distribution in the U.S.* 20, 28 (AMA 1999).

## B. The Misguided Ambition of Antidiscrimination Laws

It is, of course, possible to put a more aggressive spin on this issue, and to presume that these observed differences are the function not of some explicit discrimination but of a whole, loose aggregate of discriminatory practices that the law should curb if only it knew how to do so. Here, of course, we can no longer focus on the forms of *de jure* discrimination because those were largely removed in the first burst of reform, so that their residual effects have little systemic importance. Thus the early civil rights statutes deviated (mistakenly in my view) from the older libertarian tradition by imposing a duty of nondiscrimination on employers who operated in competitive markets.<sup>26</sup> The basic design error of the civil rights litigation is that its proponents thought a qualified mandate of forced association — you cannot turn down people you do not like for any one of certain forbidden reasons — was a better protection for individual opportunities than a regime that maximized the number of separate and independent employers from whom all individuals, regardless of race or sex, could obtain work. Unfortunately, this mandate reduces the number of positions available to potential workers in the first place, by making it more costly for firms to enter any given line of business.<sup>27</sup> The antidiscrimination law undercuts the element of trust so essential to employment relations by making people do business with those with whom they do not want voluntarily to associate.<sup>28</sup> But these objections were brushed aside in the early going on the view that the antidiscrimination law cleansed hiring decisions of false influences, and thus happily served to increase the rationality and effectiveness of the overall employment decision.

Yet once that view is taken, then it becomes necessary to decide which deviations from the anticipated rationale patterns are permissible and which ones are not. Although early civil rights cases insisted that one show some form of disparate treatment to make out a civil rights violation,<sup>29</sup> that position was quickly undercut by allowing inferences of intention to be drawn from the

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<sup>26</sup> For a defense, see Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard 1992).

<sup>27</sup> See *id.* at 73.

<sup>28</sup> See *id.* at 75–76.

<sup>29</sup> See, for example, *McDonnell Douglas v. Green*, 411 US 792, 802 (1973) (plaintiff must make prima facie case that she was a qualified candidate rejected under circumstances suggesting discrimination); for later amplification, see *Texas Department of Community Affairs v. Burdine*, 450 US 248, 256 (1981) (employee bears “ultimate burden of persuading the court that she has been the victim of intentional discrimination”).



differences in outcome found in the cases.<sup>30</sup> The usual formula, repeated countless times in civil rights litigation, treats the initial imbalance between two groups (white/black, male/female) as a presumptive violation of the law, and then allows the employer to justify that difference by showing how it all relates to the business at hand.<sup>31</sup> But the antidiscrimination laws rest on an abiding suspicion of an employer's motives, so in the good common law style of pleading, the employee may then prove that those ostensible justifications are mere pretexts for some form of illicit conduct.

This tripartite structure quickly invited the use of statistical argument in disparate treatment cases, for a court must decide whether any imbalance in the work force took place by chance or design.<sup>32</sup> Thus by degrees we have a movement from disparate treatment (the initial theory) to disparate impact (the ultimate resting place), wherein the matter of intention was submerged under a theory in which the dispersion of outcomes alone established the wrong, wholly apart from the intention that brings it about.

### C. Social Patterning and Disparate Impact

The critical policy question asks whether it is sound to draw an inference from outcomes to practices — that is, to ask whether the program of patterned justice makes sense in the area of differences in employment and life patterns for men and women, or indeed anywhere else. For those who remain committed to the belief in unobservable system-failure, the answer to that question

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<sup>30</sup> See, for example, *New York City Transit Authority v Beazer*, 440 US 568, 584 (1979) ("A prima facie violation of the [Civil Rights] Act may be established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities."); *Hazelwood School District v United States*, 433 US 299, 307–08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."); *International Brotherhood of Teamsters v United States*, 431 US 324, 340 n 20 (1977) ("[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population.").

<sup>31</sup> Lack of discriminatory intent is not a sufficient defense in disparate impact cases. See, for example, *Griggs v Duke Power Co*, 401 US 424, 431 (1971) (holding that employer must show business necessity); *Albemarle Paper Co v Moody*, 422 US 405, 425–26 (1975) (holding that employer must show job-relatedness).

<sup>32</sup> See, for example, *McDonnell Douglas*, 411 US at 804–05 ("[S]tatistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [his or her] refusal to rehire [a dismissed employee] in this case conformed to a general pattern of discrimination against blacks."). A similar logic applies to sex.

is easy: the imbalances are present wrongs to be rectified, not outcomes to be explained, let alone celebrated.<sup>33</sup>

I think that this chain of inferences is mistaken. The connection between outcomes and inputs is far from apparent. Indeed, there is no more obvious proposition than this: equal opportunities will always yield very different results, all quite unequal. In part the difference is simply a matter of chance. After all, two sets of 1000 coin-flips are not likely to yield 500 heads each. But it is a mistake to chalk up to randomness all of the observed differences within or across groups. There is good reason to believe that these differences are in general a function of powerful, systematic tendencies. Applied to employment and social role differentiation by sex, the conclusion seems clear: a system of equal opportunities to participate in business and political arrangements will yield differences in occupational choices and political beliefs. Experience amply confirms the resulting variety.

In many instances the manifest difference in outcomes has not been taken as a response to systematic differences in preferences between men and women. Rather, it is treated as a sign that the system itself did not operate in proper fashion but was controlled by some hidden flaw. One chief explanation is that "society" (often spoken of as some detached, impersonal entity) determines the preferences of all individuals so that the preferences that are observed in practice are not "authentic" no matter how deeply held. Rather, they are a product of acculturation and upbringing.<sup>34</sup> Even if the choices so made do not quite rise to the level of false consciousness, they nonetheless operate improperly. This renews the emphasis on the usual suspects for market imperfections: asymmetrical information, improper discounting of future gains, unconscious discrimination, illicit stereotyping, unfortunate path dependence, ingrained cognitive biases, and, of course, glass ceilings — stuff, like the ether, that you could sense but could not see, let alone measure. So long as one regards disparate outcomes as signs of market imperfections, then the target for potential reforms is too obvious to dispute.<sup>35</sup> The only serious

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<sup>33</sup> See Becker, 1999 U Chi Legal F at 25 (cited in note 1). Feminism does take other forms. See, for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 168–74 (Harvard 1982) (discussing valuing gender differences).

<sup>34</sup> Some feminist writers try to explain away gender differences as constructs of pervasive, hidden social practices. See, for example, Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (California 1978) (discussing how female mothering creates gender differences at infancy).

<sup>35</sup> Catharine A. MacKinnon characterizes this prevalent version of feminism as the "dominance" approach, which strives to create a gender-neutral reality. Needless to say,

question is what forms of intervention are appropriate. The message is never, but never, be comfortable with the status quo.

#### IV. DIFFERENT ENDOWMENTS, DIFFERENT BEHAVIORS

I think that this modern trend in feminist argument is deeply flawed. I now hope to briefly explain the source of the error. Recall again the premise of the argument: in a just world, we should expect to see an equilibrium of parallel distributions between men and women in all relevant dimensions of employment. But why should we make that assumption? The issue here is not a *moral* question, so it cannot be said that people who deny the position are misguided in the perceptions of what the world ought to be. Rather, the issue is a *predictive* question with a *counterfactual* component. Knowing what we do about human nature, do we think that women and men will, in the aggregate, follow similar career paths in a market system that is not tainted with duress, fraud, or incompetence? I think that the answer has to be no. To put the point more strongly, I would be amazed if any voluntary sorting mechanism, like the one operative in a market economy, ever produced that identity between any two different population groups, let alone between men and women.

##### A. Same Goals, Different Endowments

Let me make the case by starting with an assumption of what is *common* between men and women, namely that individuals in both groups seek to maximize their utility by finding that personal and occupational path that best suits their tastes and other natural endowments. My descriptive assumption is that individual self-interest (suitably modified to take into account family and friends) drives and explains the behavior of individuals of both sexes. But that common commitment to self-interest, broadly defined, does not lead them down the same behavioral paths. Part of the reason is that their initial endowments differ. Many differences are manifestly physical, but physical characteristics do not operate in a vacuum, so some differences also operate in a psychological sphere.<sup>36</sup> The former seems too obvious to

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Professor MacKinnon's outlook diverges radically from mine. See MacKinnon, *Toward a Feminist Theory of the State* at 215–34 (cited in note 20); Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32–45 (Harvard 1987).

<sup>36</sup> See, for example, Kingsley R. Browne, *Sex And Temperament In Modern Society: A Darwinian View Of the Glass Ceiling and the Gender Gap*, 37 *Ariz L Rev* 971, 1006–16

dispute, and it is the sort of difference that cannot be overcome by changes in diet or exercise. Brute biology matters too much for these social responses to neutralize the evident differences. From this point of departure, I can see no *a priori* reason for positing that the psychological make-up of men and women is identical when physical differences between them are manifest. As for the latter, a well integrated personality requires that all the pieces fit together. Let the shape of one piece change, and we should expect others to change in response to it, even if one piece is physical and the other mental.

I must provide some methodological qualifications. In making this statement, I recognize that all men are not identical in these characteristics any more than all women are identical. In speaking about men and women here, I only mean to say that their overall distributions differ in predictable ways along many dimensions, *not* that all men, as a class, or all women, as a class, are identical in all material ways. There are spreads within each sex, just as there are differences between the two distributions. Women may have a longer life expectancy than men, but that does not imply that all women outlive all men.<sup>37</sup> Men may be taller than women, but that does not mean that some women are not taller than some men.<sup>38</sup> So it goes with any trait on which it is possible to array individuals, both within and across sex groups. But for the purposes of this discussion, it is the group differences, not the individual differences within groups, that set the relevant focal point. It is group differences that explain aggregate differences. We have, as it were, two bell curves that overlap, but which are not identical. Their differences count as much as their similarities.

That said, we should not expect that any set of sex-linked differences will be confined to a single dimension. Suppose that men are stronger than women; it would be odd to think that women would then be more aggressive in their physical interactions than men. Why is it in their interest to pursue actions that could expose them to greater peril than men? There is no survival

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(1995) (arguing for an evolutionary basis for the different psychological characteristics that women and men seek in potential mates).

<sup>37</sup> As of 1996 it was a 6-year advantage (79 versus 73) for females. United States Bureau of the Census, *Statistical Abstract of the United States: 1998-94*, Table No 128 (GPO 118th ed 1998) ("Expectation of Life at Birth, 1970 to 1996, and Projections, 1995 to 2010").

<sup>38</sup> About half of males between 20 and 69 are taller than 5'9", as compared to less than 5 percent of females in that age range. *Id.* at 153, Table No 240 ("Cumulative Percent Distribution of Population, by Height and Sex: 1988-94").

value in a mismatch of physical and psychological traits. Rather, the sensible working hypothesis is that evolution favors the emergence of personality traits that are organized and developed as complements in some integrated whole.<sup>39</sup> If you know about the physical differences, then you can posit that the influences of natural selection will line up those differences with associated differences in psychological traits. Of course social influences have their role to play as well. On balance, however, we should expect socialization to reinforce these basic differences. It is not in the interest of parents, male or female, to guide their own children along the path to self-destruction. We can debate the strength of any correlation between traits in the physical and the psychological realms, but it would be foolhardy to expect for all such correlations to be zero. If differences across different dimensions thus reinforce each other, then we should expect to see fairly systematic differences in the *aggregate* data, even if both groups contain notable outliers.

#### B. Division of Labor Within the Household, and Without

Next there are key questions about the integration of home and work life. Here again, I take it as an indisputable difference that, as a group, women have to (and want to) devote a greater portion of their resources to childbirth and childrearing than do men. Pregnancy and nursing have those characteristics, and even though single women and married couples can substitute technology for parental care, that strategy will not in the usual case equalize the level of time in child care given by each parent. The psychological dispositions should on average match the capacity to give care, so that women will have a greater desire (or tolerance) for this than men.<sup>40</sup> Within families, that differential does not suggest that women do all the childrearing and men none. But it also suggests that if couples make their trade at the margin, then women will do more childrearing than men, given their greater affinity for that activity in some, but not all, cases. The

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<sup>39</sup> See, for a lengthier examination, Richard A. Epstein, *The Varieties of Self-Interest*, 8 Soc Phil & Pol 102, 105–11 (Autumn 1990) (discussing how evolution favors asymmetrical behavior and preferences between the sexes).

<sup>40</sup> See, for example, Sara Ruddick, *Maternal Thinking*, 6 Feminist Stud 342, 360 (1980) (arguing that the social rather than biological role of mothering, which women perform predominantly, encourages an ethic of care that is not as pronounced in those who do not perform this role). Robin West also roots a female ethic of care in women's difference from men. See West, *Caring For Justice* 110 (NYU 1997) ("I have no doubt . . . that . . . [women's] large and small acts of self-sacrifice are emblematic of a distinctive moral voice.").

egalitarian marriage will therefore face a systematic obstacle by demanding equal care from husband and wife. That requirement, rigidly imposed on a task by task basis, will reduce the total production obtainable from marriage, which in turn will reduce both the frequency of, and gains from, entering into marriage. It is no surprise that women take more family leave time than men.<sup>41</sup> It is no accident that most people still use the word "house-husband" with a tinge of bemused disdain.

The effects of differential commitment are not confined to the division of responsibility in raising young children. It influences other occupational and educational choices which are complementary to, and dependent on, family choices. Women commonly take several years off from work, or reduce their workloads during the years that their children are young. There is no reason to think that their husbands have ordered them to do this. To be sure, at the margin, we can always find conflicts of interest. But in the round, the more plausible explanation is that the desires and the functions align, as noted above, so that relative to men, women have a greater desire to remain at home for extended periods of time, even at the cost of some occupational and career advancement. That difference in career choices is, in my view, voluntary in most cases (so much so that part-time work to make ends meet is regarded by many women as the distraction when the children are young and at home). Here is one case to follow the revealed preferences: most women who don't work full-time don't want to work full-time.<sup>42</sup>

Once that basic choice is made, it influences the patterns of investments that women make in the workplace and in training

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<sup>41</sup> See Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 92, 271 (US Dept of Labor 1996) (noting that (a) women represent 58.2 percent of workers taking family and medical leave, while men only 41.8 percent, and (b) women are nearly twice as likely as men to take leave of 29–84 days), available online at <[http://www.ilr.cornell.edu/lib/e\\_archive/FamilyMedical/FamilyMedical.pdf](http://www.ilr.cornell.edu/lib/e_archive/FamilyMedical/FamilyMedical.pdf)> (visited Aug 1, 1999). The number here does not indicate the amount of income lost owing to unpaid leave.

<sup>42</sup> The Los Angeles Times has reported that "[h]alf of all the women and 20% of the men [surveyed] said they wished they could work part-time." Daniel Q. Haney, *Researchers Find Couples Working More Than Ever, and Liking It Less*, LA Times C6 (Jan 24, 1999), reporting on the National Study of Families and Households. The point is only suggestive, not conclusive, because it does not address in so many words the position of those women who are part-time workers. But the overall sense nonetheless remains clear. The tradeoff between home and the workplace is different for most women relative to most men. It is also worth noting that the definition of full-time differs for men and women, with men putting in, on average, about six hours more per week than women. See Jerry A. Jacobs and Kathleen Gerson, *Who Are The Overworked Americans?*, 55 Rev Soc Econ 442, 444 (1998).

for work. There is, for example, now a differential willingness to take jobs that have high-risk characteristics (especially over the dimension of time). That in turn leads larger numbers of women to do jobs on a piecework basis, with fixed income, so that the residual risk bearers are disproportionately men.<sup>43</sup> Over a lifetime this influences the earnings levels by sex, the nature of the professions into which women and men go, and more critically, the roles that they occupy within those professions. The point here is that even if all people were the same in every dimension but *one*, we should expect to see major differentiation in career paths and outcomes by simple, repetitive application of the principle of comparative advantage. As a higher percentage of women gravitate toward flexible hours, more men move into jobs that require longer hours and extended travel. As men enter occupations that involve the use of strength, women incline toward other careers, including counseling, publishing and administration. If the differences work across multiple dimensions (including, as I have argued elsewhere, the taste for risk),<sup>44</sup> then we should expect that occupational choices and career paths between men and women will continue to diverge as women continue to enter the workforce in ever greater numbers. Rapid changes in sex roles do not necessarily entail convergence in what people do. The older differences between women at home and men at work will decline. They will, however, be replaced by new differences, more subtle to observe, but important for understanding the newer social order.

Although a bit outdated today, Victor Fuchs' informative 1988 study, *Women's Quest for Economic Equality*, makes this basic point. Large numbers of women have entered the professions in recent years, most notably law and medicine. But the divergent career paths become most striking when one looks at the organization of subspecialties.<sup>45</sup> There are far more women in family law than in contingent fee tort litigation; there are far more in pediatrics or obstetrics and gynecology than there are in

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<sup>43</sup> See Epstein, 8 Soc Phil & Pol at 112-13 (cited in note 39) (discussing how biological determinants of human behavior can produce different preferences for risk between the sexes).

<sup>44</sup> See Richard A. Epstein, *Gender is for Nouns*, 41 DePaul L Rev 981 (1992); Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 Geo L J 75 (1993); Epstein, 8 Soc Phil & Pol 102 (cited in note 39).

<sup>45</sup> Victor R. Fuchs, *Women's Quest for Economic Equality* 32-57 (Harvard 1988) (noting also that the gaps in self-employed income is as great as in employee income, and that differences between the sexes in tips and commissions track the differences in wages). Discrimination by employers cannot alone explain these strong correlations.

neurosurgery or orthopedic surgery.<sup>46</sup> Some portion of this differential could be explained by discrimination within the field, but the variations are so pronounced that it is hard to believe that all the pressures come on the side of the employers, and none on the side of the employees. In that world it is hard to posit discrimination as the source of all occupation differences, as if by some irreducible law of nature. Even the admitted differences in employer response on the demand side should not be attributed solely to improper behavior. The selection effect works on the other side as well. Women in effect choose their career paths to maximize a function that attaches weights to work and family which differ systematically from those attached by men. There is on this view no iron social law that designates certain positions as male and others as female. But there are differential pressures at work at every stage of life in the choice of profession, and the roles within that profession.

#### V. PRIVATE AND COLLECTIVE PREFERENCES: OR, THE TYRANNY OF SMALL DECISIONS

How long should we expect this current division of labor to persist? It is hard to say how matters will sort themselves out. But no matter how trends develop, it would be a serious mistake to assume that all social pressures cut in the same direction. At one level, it is possible to discern a social prisoner's dilemma game that operates on labor markets. My own casual empiricism says that it is quite common for women to champion, and for men to agree, that greater female participation in certain high-status professions and disciplines counts as an unquestioned social good. At the social choice level, we can find substantial political support for government programs that push in this direction, hence the carrot of affirmative action programs (many of which go beyond what the law requires) and the stick of antidiscrimination laws (under which judges are too eager to find discrimination when

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<sup>46</sup> For women in the legal profession, see Deborah L. Rhode, *Perspectives on Professional Women*, 40 Stan L Rev 1163, 1179 (1988) ("[F]emale attorneys in the mid-1980s . . . were disproportionately represented in low-prestige specialties."), citing Bill Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, but They're Happy*, 69 ABA J 1384, 1385 (1983); Wynn R. Huang, *Gender Differences in the Earnings of Lawyers*, 30 Colum J L & Soc Probs 267, 280 (1997) (illustrating survey results that "a higher percentage of women than men was found in family law and public interest law, while a disproportionately higher number of men than women was found in corporate law and litigation"). In 1997, there were 25,633 women physicians in pediatrics and 12,542 in obstetrics and gynecology, while there were 217 in neurosurgery and 756 in orthopedic surgery. *Physician Characteristics* at 28 (cited in note 25).



none exists). Once again the current labor scheme does not look like patriarchy in action.

But matters shake out quite differently at the individual level. The same woman who thinks that there should be more female partners at the major investment banking houses might make a personal decision not to put in the endless hours needed to reach that goal. More than her male counterpart, she may want to stay at home with her children or she may just hate traveling. She may dislike the grind and the constant bullying in high-level negotiations. She may well resist any suggestion that stereotypes are at work in this regard. Hers is just an individual judgment about herself; self-consciously, it is not one about the position or capabilities of women in general — an issue on which she takes the opposite view.

This careful psychological calibration, however, hardly matters for these purposes. The operative question in all these discrete settings is how often that same intellectual and emotional process leads to the same results. If most women go through the same thought process only to reach the same conclusion, then the process we see at work may be termed *the tyranny of small decisions*. The landscape of family and occupational choices reflects not just the big picture views on sex-equality, but also the composite small picture views of what is right for me and my family. The exact proportions of the two influences are hard to discern, but in any particular case, the immediate family imperatives are likely to exert in each individual case a disproportionate impact on the final decision.

This simple scenario allows us to sketch out a public choice-like explanation for the disconnect between political attitudes and personal behavior. It is an explanation that does not require us to assume the irrationality, instability, or endogeneity of preferences. In political settings, the personal is put to one side; people will vote their general preferences, and will happily support laws that presume that any imbalances in labor markets are really a function of social forces of discrimination. So the politics of a nation moves to the left, more for women than for men.<sup>47</sup> But

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<sup>47</sup> See John R. Lott, Jr. and Larry Kenny, *How Dramatically Did Women's Suffrage Change the Size and Scope of Government* 1, 29–36 (Sept 1998) (unpublished manuscript, presented as John M. Olin Law & Economics Working Paper No 60 2d Series, Univ of Chicago Law School), available online at <<http://www.law.uchicago.edu/Publications/Working/index.html>> (visited Aug. 1, 1999) (noting the liberal shift in national politics resulting from women's suffrage and the persisting "gender gap" in voting for Presidential elections).

at the individual level, the accumulated set of practices turns out to be more conservative than the public rhetoric because a set of individual rational choices leads to outcomes that reinforce the occupational and wage splits that are globally deplored. The long-term equilibrium is thus in tension. The sum of the private selection decisions will be treated as powerful evidence of discrimination that requires strong government antidotes, but these ground-level practices will prove largely resistant to grander changes. Most legal intervention is directed against employers. The key determinant is not firm selection, as is generally supposed, but worker selection that to this day remains largely outside the influence of the law. Who wants a statute, for example, that says (and means): "It shall be an unlawful employment practice for any *employee* to fail or refuse to work, or to quit, or to otherwise discriminate against any employer because of his race, color, religion, sex, or national origin"?

Yet this speculation leaves unanswered the hard question as to why the politics of women veer systematically to the left of men, and why the trend is becoming more pronounced.<sup>48</sup> The first cut at this problem suggests that the opposite should be the case. As women receive as much or more formal education than men, as women enter the workforce in larger numbers, we should expect their experiences to converge with those of men. With the convergence of experience comes, one supposes, the convergence of political views. But the opposite has happened. When women enter the workforce, their experiences are often not the same as men. They think more about childcare on the home front. They are more concerned with travel and with long hours. They are more interested in part-time positions. They obviously have different concerns with sexual harassment. And they bring to the workplace a set of styles and attitudes that do not mesh perfectly with what they perceive as the dominant male culture.

With time, differences in orientation will surely lead to changes in workplace culture. In the short run they will also find expression in the voting booth, leading to legislation that influences the behavior in employment markets. The issues become

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<sup>48</sup> Women and men have diverged in party identification, with women leaning to the left and men to the right. See Steven Stark, *Gap Politics: More Women Have Moved to the Democratic Party and More Men Have Gone Over to the Republicans*, *Atlantic Monthly* 71 (July 1996). According to a 1996 Gallup Poll on partisan identification, 29 percent of the women surveyed identified with the Republican Party and 40 percent identified with the Democratic Party, as compared to 33 percent and 32 percent of men surveyed for the parties, respectively. Harold W. Stanley, *Vital Statistics on American Politics: 1997-1998* 111, Table 3-2 (Cong Quarterly 6th ed 1998).

ever more clouded because the influx of women into the workforce often is at odds with itself. The demands of high-paid professional women do not dovetail ideally with the demands of women who hold "pink-collar" jobs. The apparent unity of women in the end will turn out to be no greater than the apparent unity among men. With the rise of these cross-currents come ever more complex patterns within firms and within politics.

### CONCLUSION

Here is not the place to analyze the output from so complex a process. But it is appropriate to close with the cautionary note that blunt instruments will not do in either the world of description or prescription. On the descriptive side, I think that we have to be candid as to what the differences between men and women are, and to recognize that their effects are not cabined into some tiny area of human life, but influence all our experiences and interactions. On the normative side, I think that we have to fight against the common view that equality of opportunity, if rightly conceived, necessarily and properly brings about equality of results. More specifically, we should not try to tinker with market outcomes by insisting on proportional representation across the ranks.

The pattern that we see is not one that is driven by exploitation (which, like the ether of classical mechanics, becomes ever more difficult to detect). Rather it is driven by informed choices at the micro level. The greatest protection for all workers is a broad range of choices made possible by free and open entry into labor markets. Of course, we have to be alert in individual cases to the risks of duress, misrepresentation, and incapacity that can skew contractual preferences in untoward ways. But these small perturbations, of immense complexity in litigation, do not aid in understanding broader social trends in society, for they operate only in a small fraction of cases, and then in ways that are orthogonal to the concerns about male/female differences in education, income, occupation, and career path. Once we adopt the proper social stance, then we can forget about patriarchy and say with confidence that outcome differences are a source of social strength and a sign of a free society.